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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1368

THE NATIONAL CASH REGISTER COMPANY,
Petitioner,

vs.

NCR EMPLOYEES' INDEPENDENT UNION, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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THE NATIONAL CASH REGISTER COMPANY,
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NCR EMPLOYEES' INDEPENDENT UNION, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, The National Cash Register Company (herein "NCR"), prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on December 18, 1973.

OPINION BELOW

The opinion of the Court of Appeals is officially reported in ..... F. 2d ....., and appears herein as Appendix A at p. A1.

JURISDICTION

The judgment of the Court of Appeals was entered on December 18, 1973. (Appendix A, *infra*, p. A5) This Court has jurisdiction under 28 U.S.C. §1254(1).

QUESTION PRESENTED

When the parties to a collective bargaining agreement have expressly agreed that a grievance is "considered settled" unless appealed by the Union through "written notification" and that "where arbitrability such as timeliness is at issue, the arbitrator will hear evidence and argument on that issue, and decide that issue first", did the Court below err in ordering the parties to proceed to arbitration of grievances on the merits in the absence of "written notification" and "without regard to any possible contractual time or other procedural limitations"?

STATUTE INVOLVED

This case involves Section 301(a) (29 U.S.C. §185(a)) of the National Labor Relations Act, as amended. The relevant statutory provisions are set forth in Appendix B, *infra*, pp. A6-A7.

STATEMENT

The Events Prior to Litigation.

At all relevant times, the NCR Employees' Independent Union (hereinafter "the Union") represented employees of the Petitioner in an appropriate collective bargaining unit in the Petitioner's plant at Dayton, Ohio. On December 16,

1968, the Petitioner and the Union agreed on the provisions of a new collective bargaining agreement following a strike of several weeks duration. As an incident to the settlement, the parties agreed to a temporary work schedule covering the period from December 18, 1968 to January 4, 1969 with a normal work schedule to resume thereafter.

On January 30, 1969, the parties executed their new collective bargaining agreement which was to become effective as of December 18, 1968, and remain in effect by its terms until September 1, 1971. This agreement contained no reference to the temporary work schedule which had expired on January 4.

Article 7 of the new collective bargaining agreement contained an extensive grievance procedure terminating in binding arbitration. Section 7.08.03 provided that:

> "All grievances between the parties as to the interpretation, application or alleged violation of this Agreement, including any supplements thereto, shall be subject to arbitration. The arbitrator shall not have the power to add to or subtract from or modify this Agreement, or any supplements thereto, in any way whatsoever."

Section 7.01 stated:

> "For the purpose of this Agreement, the term 'grievance' shall be defined to mean a dispute between the parties as to the interpretation, application, or alleged violation of this Agreement, including any supplements thereto. If any question arises as to whether a particular dispute is or is not a proper subject for a grievance within the meaning of this Section 7.01, the question may be reserved throughout the grievance procedure and be determined, if necessary, by arbitration."

Section 7.08 provides that a grievance may be appealed to arbitration *only* if "*written notification*" to that effect is given to the Company "*within thirty (30) calendar days* after the Union's receipt of the Company's Step 5 reply to the grievance" and that "*Any grievance not so appealed shall be considered settled on the basis of the reply given at Step 5.*" (Emphasis added)

Section 7.08.04 states that:

> "*Where arbitrability such as timeliness is at issue, the Arbitrator will hear evidence and argument on that issue, and decide that issue first.* Providing the grievance is found to be arbitrable he shall then hear the evidence and argument on the merits, and render his award in writing, within thirty (30) calendar days from the date of the hearing, or within thirty (30) calendar days from his receipt of the briefs, if any, whichever is later." (Emphasis added)

From December 26, 1968 to January 3, 1969, eight grievances were filed under the grievance provisions of the new collective bargaining agreement which, by its terms, became effective December 18, 1968. Each of these grievances claimed a violation by NCR of the terms of the temporary work schedule referred to above. After investigation, NCR, in the final step of the grievance procedure, denied all eight grievances. The Union then advised NCR that it would not appeal any of the eight grievances to arbitration.

The State Court Suit and Removal.

On February 13, 1969, the Union and three employees initiated the instant action by filing a class action in the Court of Common Pleas for Montgomery County, Ohio, on behalf of 12,620 employees in the bargaining unit, seeking

a declaratory judgment as to employee rights under the temporary work schedule. Back pay amounting to several hundred thousand dollars was sought. Arbitration was not requested. NCR removed the action to the United States District Court for the Southern District of Ohio, Western Division, at Dayton.

The Initial Decision of the District Court.

Following removal, NCR filed its motion to dismiss in the District Court, asserting that the parties had agreed that arbitration would be the exclusive remedy for any claimed breach of the collective agreement. The District Court, on January 11, 1971, granted NCR's motion without hearing, treating the motion to dismiss as a motion for summary judgment.

The Initial Decision of the Court of Appeals.

On appeal by the Union, the Court of Appeals for the Sixth Circuit, on April 10, 1972, vacated the order of the District Court and remanded the cause for further hearing. The Court of Appeals held that the District Court had erred in treating NCR's motion to dismiss as a motion for summary judgment without requiring the notice of hearing provided in Rules 12(c) and 56 of the Federal Rules of Civil Procedure. The *per curiam* opinion of the Court of Appeals directed the District Court, if it again concluded that arbitration was respondents' exclusive remedy, to require the parties "to proceed to arbitration on the violation issue rather than dismiss the action outright." In such event, the District Court was also directed to

> "* * * specify the applicable arbitration provision and *its order should direct arbitration of the substantive issue without regard to any possible contractual time or other procedural limitations.*" (Emphasis added)

The Second Decision of the District Court.

On January 16, 1973, the District Court reaffirmed its original conclusion that arbitration was the Respondents' "exclusive remedy." (Appendix C) Acting expressly pursuant to the prior directive of the Court of Appeals quoted above, the District Court ordered:

> "[t]hat the plaintiff Union and the [defendant] Company proceed to submit the dispute concerning the application and interpretation of the 'Work Schedule' without regard to any contractual time or procedural limitation contained in Article VII of the Collective Bargaining Agreement."

The Second Decision of the Court of Appeals.

NCR appealed, challenging (1) the order to arbitrate and, alternatively (2) that part of the District Court's order barring NCR from asserting "contractual time or procedural limitation" in the arbitration proceeding ordered by the Court. The Court of Appeals affirmed this second decision of the District Court, stating:

> "This lawsuit was brought in an atmosphere of confusion as to whether the temporary work schedule was a part of the collective bargaining agreement. Since the schedule related only to a limited period and was not executed at the same point in time as the agreement, the union did not act unreasonably when it concluded that the schedule was not incorporated into the agreement and that its remedy was with the courts, not the grievance procedure. Yet in the course of this lengthy litigation, the period for filing a timely grievance under the agreement expired. We were cognizant of this problem when this case was first before the Court and directed that

should the district court find that the grievance-arbitration procedure controlled, it should not allow the company to foreclose arbitration by asserting that the union's claim was not timely filed. Had we done otherwise, it would have been at the expense of the well-established congressional policy favoring arbitration as a means of preserving union-management peace. *See United Steelworkers of America* v. *American Mfg. Co.*, 363 U.S. 564, 567-568 (1960); *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960); *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 598 (1960).

"Our decision simply means that arbitration remains as a viable means of resolving the dispute. *See generally, Boone* v. *Armstrong Cork Company*, 384 F. 2d 285 (5th Cir. 1967)."

REASONS FOR GRANTING THE WRIT

1. The Court Below Has Decided Federal Questions in a Way in Conflict with Applicable Decisions of This Court.

a. Under Decisions of This Court, the Cause Should Be Dismissed.

It is elementary that:

> "An employer has no obligation to arbitrate issues which it has not agreed to arbitrate." *John Wiley & Sons, Inc.* v. *Livingston*, (1964) 376 U.S. 545, 547.

The Court there also stated:

> "The duty to arbitrate being of contractual origin, a compulsory submission to arbitrate cannot precede judicial determination that the collective bargaining agreement does in fact create such a duty." (376 U.S. at 547)

Likewise, in *Steelworkers* v. *Warrior & Gulf Navigation Co.*, (1960) 363 U.S. 574, the Court held that:

> "Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." (363 U.S. at 582)

It is clear from the language of Section 7 of the collective agreement in the instant case that arbitration was intended by the parties to be the exclusive remedy available with respect to "[a]ll grievances between the parties as to the interpretation, application and alleged violation of this Agreement * * *." It is also undisputed that the Respondents herein elected not to use the arbitration provisions of the agreement for the resolution of the instant

grievances relating to the interpretation, application or alleged violation of the agreement. It is undisputed that before a class action suit for money damages was filed in the state court on February 13, 1969, the Petitioner was advised by the Union that the Union would *not* appeal the grievances to arbitration. Neither the Union nor the Company has requested arbitration of the grievances since that date.

As the parties had agreed that arbitration was to be the exclusive remedy, the District Court acted correctly in initially declining to try the case on the merits and in its implicit rejection of the Respondents' claim for money damages. That is because:

> "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement. * * *" Section 203(d), Labor Management Relations Act, 1947, 61 Stat. 154, 29 U.S.C. §173(d).

In *Steelworkers* v. *American Mfg. Co.*, (1960) 363 U.S. 564, the Court, construing the above statute, stated:

> "The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator.
>
> * * *
>
> The courts therefore have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim." (363 U.S. at 572)

The court below erred, however, when, instead of dismissing the cause, it affirmed the subsequent order of the District Judge referring the cause to arbitration. *Neither party had agreed to arbitrate these grievances.*

Under Section 7.08 of the agreement, only the Union could request arbitration and such a request must be by "written notification to that effect to the Company given within thirty (30) calendar days after the Union's receipt of the Company's Step 5 reply to the grievance." The parties further agreed that:

> "Any grievance not so appealed shall be considered settled on the basis of the reply given in Step 5."

Admittedly the Union gave no such written notification and, under the express language of the agreement, the controversy terminated on the basis of the Petitioner's reply in Step 5. Under these circumstances, the court below should have dismissed the class action for damages instead of referring the merits to arbitration.

In *Republic Steel Corp.* v. *Maddox*, (1965) 379 U.S. 650, an employee sued an employer for money damages in the state court. This Court ordered *dismissal* of the cause because the collective agreement, as in the instant case, contained a grievance procedure terminating in binding arbitration and the plaintiff, Maddox, "made no effort to utilize this mode of redress."

By ordering arbitration of the merits instead of dismissing the cause, the court below clearly violates the precept that "an employer has no obligation to arbitrate issues which it has not agreed to arbitrate", *supra* (376 U.S. at 547), and directed compulsory arbitration without statutory or constitutional authority.

b. If the Court Below Had Authority to Order Arbitration, It Erred in Forbidding the Arbitrator to Hear and Decide "Contractual or Procedural Limitation" Issues.

Before the decision of this Court, in *Wiley, supra*, there was a conflict among the circuits as to whether questions of "procedural arbitrability", such as compliance with grievance procedure time limits, were for the courts to decide or the arbitrator. The leading cases are cited in footnote 12 of the *Wiley* opinion. In *Brass & Copper Workers Union* v. *American Brass Co.*, (CA 7; 1959) 272 F. 2d 849, for example, the Seventh Circuit held that it was for the *Court*, and not an arbitrator, to determine whether a party seeking arbitration had complied with contract time limits. On the other hand, the Sixth Circuit had held, in *Local 748* v. *Jefferson City Cabinet Co.*, (CA 6; 1963) 313 F. 2d 231, that timeliness involved "procedural arbitrability" and, as such, was for decision by an *arbitrator* rather than by the Court.

In *Wiley*, the employer contended that the union had failed to comply with steps of the grievance procedure which, under the language of the agreement, were conditions precedent to arbitration. The employer urged that the question of compliance with these "procedural" conditions must be decided by the court, not an arbitrator. In rejecting this contention, the Court stated:

> "We think that labor disputes of the kind involved here cannot be broken down so easily into their 'substantive' and 'procedural' aspects. Questions concerning the procedural prerequisites to arbitration do not arise in a vacuum: they develop in the context of an actual dispute about the rights of the parties to the contract or those covered by it." (376 U.S. at 556-57)

The Court said:

> "Doubt whether grievance procedures or some part of them apply to a particular dispute, whether such procedures have been followed or excused, or whether the unexcused failure to follow them avoids the duty to arbitrate cannot ordinarily be answered without consideration of the merits of the dispute which is presented for arbitration. * * * It would be a curious rule which required that intertwined issues of 'substance' and 'procedure' growing out of a single dispute and raising the same questions on the same facts had to be carved up between two different forums, one deciding after the other. Neither logic nor considerations of policy compel such a result.
>
> "*Once it is determined, as we have, that the parties are obligated to submit the subject matter of a dispute to arbitration, 'procedural' questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator.*" (376 U.S. at 557; emphasis added)

Subsequently, in *Operating Engineers* v. *Flair Builders*, (1972) 406 U.S. 487, 32 L.Ed. 2d 248, in which it was contended that a union's arbitration request was barred by laches, this Court again held that time limits were for determination by an arbitrator and not by the Court. After noting that the parties had agreed to arbitrate "any difference" which could not be settled within forty-eight hours of occurrence, the Court stated:

> "There is nothing to limit the sweep of this language or to except any dispute or class of disputes from arbitration. In that circumstance, we must conclude that the parties meant what they said—that 'any difference,' which would include the issue of laches raised by respondent at trial, should be referred to the arbi-

> trator for decision. The District Court ignored the plain meaning of the clause in deciding that issue." (406 U.S. at 491)

The Court further stated:

> "But once a court finds that, as here, the parties are subject to an agreement to arbitrate, and that agreement extends to 'any difference' between them, then a claim that particular grievances are barred by laches is an arbitrable question under the agreement." (406 U.S. at 491-92)

The above decisions of this Court are simply applications of the landmark trilogy decisions. *American Mfg. Co.* and *Warrior & Gulf, supra*, and *Steelworkers* v. *Enterprise Wheel & Car Corp.*, (1960) 363 U.S. 593.

In the instant case, the arbitration agreement between the parties does not employ the words "any difference" but does contain language equally as comprehensive. Section 7.08.03 says, "*All grievances* between the parties as to the interpretation, application or alleged violation of this Agreement * * * shall be subject to arbitration." This is surely as broad as "any difference." Also, in Section 7.01 the parties specifically agree that:

> "If *any question* arises as to whether a particular dispute is or is not a proper subject for a grievance within the meaning of this Section 7.01, the question may be reserved throughout the grievance procedure and be determined, if necessary, by arbitration." (Emphasis added)

"Any question" likewise seems as broad as "any difference."

Finally, and most importantly, in the instant case the parties themselves had specifically agreed in writing that

the arbitrator would hear and decide any question which might arise with respect to "arbitrability" including "timeliness" of compliance with the agreed steps of the grievance procedure. In Section 7.08.04, they agreed that:

> "*Where arbitrability such as timeliness is at issue the arbitrator will hear evidence and argument on that issue first.*" (Emphasis added)

In the instant case, the District Court, in its second decision, affirmed by the Court of Appeals in the second decision of that Court, specifically ordered:

> "That the plaintiff Union and the [defendant] Company proceed to submit the dispute concerning the application and interpretation of the 'Work Schedule' without regard to any contractual time or procedural limitation contained in Article VII of the Collective Bargaining Agreement."

Thus, it will be observed that the trial court did not determine compliance with time limits, and the arbitrator is also directed not to decide this issue.

Section 7.08.03 of the agreement specifically states that:

> "The arbitrator shall not have the power to add to or subtract from or modify this Agreement, or any supplements thereto, in any way whatsoever."

The trial court's order, affirmed by the Sixth Circuit, must be construed as a direction to the arbitrator to "subtract" the "written notice" and the time limit conditions from the agreement. Such an order not only violates the contract and invades the exclusive province of the arbitrator as construed in the above decisions of this Court, but also has obvious constitutional overtones which need not be elaborated further here.

The reason given by the Court of Appeals for this strange result is that "in the course of this lengthy litigation, the period for filing a timely grievance under the agreement expired." Actually, as indicated above, the Union had advised NCR of the Union's decision not to arbitrate *before* the litigation began. Thus, it is simply not true that the period expired "in the course of this lengthy litigation."

Having erroneously decided that the time had expired "during the course" of the litigation, the Court then stated that the District Court "should not allow the Company to foreclose arbitration by asserting that the Union's claim was not timely filed." But under the collective agreement, the employer had bargained for and obtained the clear right to foreclose arbitration whenever demand for arbitration was not in writing and timely filed. The contract, as indicated above, expressly required the arbitrator to honor the language of the contract. Surely the "congressional policy favoring arbitration" or the assumed equities of the case cannot thus destroy the collective agreement of the parties and deprive the arbitrator of his right and duty under the express language of the agreement and the decisions of this Court to decide the notice and time limit issues. In *American Mfg. Co., supra*, this Court stated that:

> "The Courts * * * have no business * * * considering whether there is equity in a particular claim." (363 U.S. at 568)

The decision of the Court below compels arbitration on terms never agreed to by NCR—the arbitration of grievances not duly noticed or timely filed under the express conditions of the arbitration agreement. Also, it invades the arbitrator's exclusive jurisdiction to determine all issues of procedural arbitrability.

2. There Is a Conflict Among the Circuits.

In the instant case, the Sixth Circuit has held that the arbitrator may not decide the issue of "procedural arbitrability" raised by the union's failure to make a timely request for arbitration. The decision conflicts with the decisions in other circuits which, since *Wiley, supra,* have uniformly held that such issues of procedural arbitrability are for the arbitrator and should not be disposed of by the Court. *Tobacco Workers* v. *Lorillard Corp.*, (CA 4; 1971) 448 F. 2d 949. (See cases cited in footnote 9 thereof) Also, in *Trailways, Inc.* v. *Motor Coach Employees,* (CA 1; 1965) 353 F. 2d 180, the Court, in directing arbitration, stated:

> "The Company's contention that the Union failed to file the grievances relating to discharge of the employees within the requisite time limits is without merit. It can raise that defense before the arbitrator but not before this Court. John Wiley & Sons v. Livingston, supra." (353 F. 2d at 182)

The instant case is also clearly at odds with the decision of the Ninth Circuit in *International Association of Machinists* v. *Howmet Corp.*, (CA 9; 1972) 466 F. 2d 1249. The Court, in directing that the arbitrator, and not the Court, should determine the issue of timeliness, stated:

> "The Fourth Circuit has held that the issue of laches, like the issue of compliance with procedural requirements of the collective bargaining agreement, should be considered by the arbitrator, not by the courts."

The Court also rejected the contention that certain issues should be withheld by court order from determination by the arbitrator. The Court stated that:

"* * * we agree that the flexible nature of the arbitration process requires that the arbitrator be given as much freedom as possible—from the framing of the issues themselves to the fashioning of appropriate remedies. The district court's function in the process is essentially ended once it has found the collective bargaining agreement susceptible of an interpretation which would cover the dispute; it should not attempt in the usual case to frame the precise question which the arbitrator must decide. See Avon Products, Inc. v. International Union, United Auto Workers Local 710, 8 Cir., 1967, 386 F. 2d 651, 657, 67 LRRM 2001. *Likewise, the arbitrator should not be foreclosed from passing on the question of arbitrability; the court has merely made the threshold decision that the collective bargaining agreement is susceptible of an interpretation making the dispute arbitrable, i.e., the issue is prima facie arbitrable.* The arbitrator should not be prevented from deciding whether or not he will so interpret the agreement.

"The matter is remanded to the district court with directions to reframe its decree in a manner consistent with this opinion."

CONCLUSION

The Petition for Writ of Certiorari should be granted and the case remanded with directions to dismiss. In the alternative, if the Court should conclude that arbitration was authorized, the Petition should be granted and the case remanded with directions to delete paragraph 2 from the order of the District Court dated January 16, 1973. (App. C, p. A8) *Federal Trade Commission* v. *American Crayon Co.*, (1956) 352 U.S. 806.

Respectfully submitted,

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APPENDIX

APPENDIX A

No. 73-1308

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NCR EMPLOYEES' INDEPENDENT UNION, ET AL.,
Plaintiffs-Appellees,

v.

THE NATIONAL CASH REGISTER COMPANY,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Ohio.

Decided and Filed December 18, 1973.

Before: PHILLIPS, Chief Judge, CELEBREZZE and MILLER, Circuit Judges.

PER CURIAM. This appeal questions whether the district court erred when it directed that a labor dispute be submitted to arbitration "without regard to any contractual time or procedural limitation" contained in the collective bargaining agreement. For reasons which we will explain below, we believe that the district court did not commit error.

In January of 1969, the National Cash Register Company executed a collective bargaining agreement with the NCR Employees' Independent Union. Previously the company and the union had agreed to a temporary work schedule which controlled the manner by which the employees would return to their jobs after a strike of several weeks. Subsequently, a dispute arose over whether the company had violated this latter agreement by not scheduling certain employees for overtime during the readjustment period. Not satisfied with the company's response, the union filed suit in February of 1969, in the Common Pleas Court of Montgomery County, Ohio and requested that the court determine the rights of certain employees to have been scheduled for overtime work. The action was later removed to the United States District Court for the Southern District of Ohio.

The company moved for dismissal, contending that the grievance and arbitration procedures of the collective bargaining agreement contained the sole remedy of the union. Consequently the court would be without jurisdic- as one for summary judgment, the district court held that the temporary work schedule was part of the collective bargaining agreement and disputes arising out of its interpretation must follow the course proscribed in the grievance-arbitration procedures. Appeal was then taken by the union to this Court. We reversed and remanded the case because we found that the district court erred in treating the motion for dismissal as one for summary judgment without notifying the parties and affording them the opportunity to present additional evidence. We closed the opinion with the following paragraph and footnote:

> In the event the court proceeds in this manner and again concludes that arbitration is the exclusive remedy on the merits of plaintiffs' claim of violation

> of the "Work Schedule," we think that in the interest of justice and equity the court should direct the parties to proceed to arbitration on the violation issue rather than dismiss the action outright.[1] It follows that if the court should conclude that the plaintiffs' claim is not governed by any arbitration clause, it would then proceed to determine the plaintiffs' claim on the merits.

Upon remand the district court again found that the grievance-arbitration procedure of the collective bargaining agreement was the exclusive remedy of the union. The court ordered that the matter be submitted to arbitration "without regard to any contractual time or procedural limitations contained in Article VII of the Collective Bargaining Agreement." The company now appeals the order on the grounds that the union must follow the entire grievance-arbitration procedure and be subject to the procedural and time limitations contained therein.

This lawsuit was brought in an atmosphere of confusion as to whether the temporary work schedule was a part of the collective bargaining agreement. Since the schedule related only to a limited period and was not executed at the same point in time as the agreement, the union did not act unreasonably when it concluded that the schedule was not incorporated into the agreement and that its remedy was with the courts, not the grievance procedure. Yet in the course of this lengthy litigation, the period for filing a timely grievance under the agreement expired. We were cognizant of this problem when this case was

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1. The Court in this event should specify the applicable arbitration provision and its order should direct arbitration of the substantive issue without regard to any possible contractual time or other procedural limitations. To enforce its order the Court will retain jurisdiction pending arbitration.

first before the Court and directed that should the district court find that the grievance-arbitration procedure controlled, it should not allow the company to foreclose arbitration by asserting that the union's claim was not timely filed. Had we done otherwise, it would have been at the expense of the well-established congressional policy favoring arbitration as a means of preserving union-management peace. *See United Steelworkers of America* v. *American Mfg. Co.*, 363 U.S. 564, 567-568 (1960); *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960); *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 598 (1960).

Our decision simply means that arbitration remains as a viable means of resolving the dispute. *See generally, Boone* v. *Armstrong Cork Company*, 384 F.2d 285 (5th Cir. 1967).

The judgment of the district court is affirmed.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 73-1308

NCR EMPLOYEES' INDEPENDENT UNION, JUNIOR H. HART, FRED L. DUFF AND PAUL B. SCOTT,
Plaintiffs-Appellees,

vs.

THE NATIONAL CASH REGISTER COMPANY,
Defendant-Appellant.

Before: PHILLIPS, Chief Judge, CELEBREZZE and MILLER, Circuit Judges.

JUDGMENT

(Filed December 18, 1973)

APPEAL from the United States District Court for the Southern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Southern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

It is further ordered that Plaintiffs-Appellees recover from Defendant-Appellant, the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

Entered by Order of the Court

/s/ James A. Higgins
Clerk

APPENDIX B

Section 301(a) of the Labor Management Relations Act, 1947, (29 U.S.C. §185(a), 61 Stat. 156) provides:

> "Sec. 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

Section 203(d) of the Labor Management Relations Act, 1947, (29 U.S.C. §173(d), 61 Stat. 154) provides in relevant part:

> "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement. * * *"

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

CIVIL CASE NO. 3658

NCR EMPLOYEES INDEPENDENT UNION, et al.,
Plaintiff,

-vs-

THE NATIONAL CASH REGISTER COMPANY,
Defendant.

MEMORANDUM OPINION AND ORDER

January 16, 1973

This is an action brought by the NCR Independent Union and three individual employees against the National Cash Register Company asking this court to determine and declare the rights of production and maintenance employees to be recalled for overtime work on Saturday, December 21, 1968 and Saturday, January 4, 1969 under the terms of a "Work Schedule" agreed upon by the Union and the Company as part of a strike settlement.

In a Memorandum Opinion and Order issued January 11, 1971 this court, treating the defendant Company's motion to dismiss for lack of jurisdiction as a motion for summary judgment concluded that there were no genuine issues of material fact for trial and found that the "Work

Schedule" was an integral part of the Collective Bargaining Agreement and that plaintiffs' exclusive remedy lay under the grievance arbitration procedures of the applicable Collective Bargaining Agreement.

On appeal the United States Court of Appeals for the Sixth Circuit remanded this action for further proceedings and directed that on remand this court give notice of its intention to treat the motion to dismiss as a motion for summary judgment and to afford the parties a reasonable opportunity to present any additional evidence bearing upon the issue of arbitration. Pursuant to the mandate issued by the Sixth Circuit this court by an order issued May 9, 1972 gave notice of its intention to treat the defendant's motion to dismiss as a motion for summary judgment and directed the plaintiff to submit additional evidence within sixty days. In response to this order the plaintiff Union has filed the affidavit of William A. Biggs, former Chairman of the Group Benefits Committee of the NCR Employees' Independent Union, the affidavit of plaintiffs' counsel and various exhibits consisting of the Collective Bargaining Agreement executed January 30, 1969, a copy of one of the eleven supplements to the Agreement which were executed on January 30, 1969 and the Union's index of supplements to the Bargaining Agreement. Supplemental briefs have been filed by both the plaintiff Union and the defendant Company.

Upon careful consideration of the briefs and the additional evidence presented by the plaintiffs the court is unpersuaded that it should depart from its original conclusion that summary disposition of this action is appropriate. The Biggs affidavit and the exhibits submitted therewith do not disclose the existence of genuine issues of material fact for trial. The court does not consider it significant that the "Work Schedule" which is the subject of this

action was not contained in any of the eleven supplements to the formal written Collective Bargaining Agreement executed by the parties on January 30, 1969. The "Work Schedule" was agreed upon by the parties to fix the time for the recall of employees if the strike was settled prior to the first of the year. The "Work Schedule" by its own terms was to be implemented during the period from December 18, 1968 to January 4, 1969. Since the schedule was to be implemented prior to the time of the formal execution of the Bargaining Agreement on January 30, 1969 no utilitarian or practical purpose would have been served by including the "Work Schedule" as a written supplement to the Bargaining Agreement. This court, therefore, reaffirms its original holding that the "Work Schedule" is an integral part of the Collective Bargaining Agreement and that the plaintiffs' exclusive remedy lies under the grievance arbitration procedures of the Bargaining Agreement executed January 30, 1969.

In the event this court again concluded that arbitration was the exclusive remedy on the merits of plaintiffs' claim of violation of the "Work Schedule," the Court of Appeals instructed this court to direct the parties to proceed to arbitration on the violation issue rather than dismiss the action outright. In its brief the defendant Company contends that this court should disregard this instruction from the Sixth Circuit for the reason that an order to arbitrate would be contrary to the interest of justice and equity and further such an order would be contrary to law and beyond the authority of this court. The court does not agree. The directive by the Sixth Circuit that this court order the parties to arbitrate rather than dismiss the action constitutes the "law of this case" and therefore this court is precluded from adopting an approach contrary to that directed by the Court of Appeals.

Accordingly, it is hereby ORDERED, ADJUDGED and DECREED:

1. That the plaintiff Union and the defendant Company submit the dispute concerning the application and interpretation of the "Work Schedule" to arbitration as provided for in Article VII of the Collective Bargaining Agreement executed betweeen the parties on January 30, 1969;

2. That the plaintiff Union and the plaintiff Company proceed to submit the dispute concerning the application and interpretation of the "Work Schedule" without regard to any contractual time or procedural limitation contained in Article VII of the Collective Bargaining Agreement.

This court hereby retains jurisdiction over this action pending the submission of the dispute described in this action to arbitration.

/s/ Carl A. Weinman
Chief Judge U.S. District Court

IN THE

SUPREME COURT OF THE UNITED STATES

APR 10 1974
JR., CLERK

October Term 1973

NO. 73-1368

THE NATIONAL CASH REGISTER COMPANY,
Petitioner,

vs.

NCR EMPLOYEES' INDEPENDENT UNION, et al.,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

BRIEF OF THE INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW) IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1973

NO. ———

THE NATIONAL CASH REGISTER COMPANY,
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vs.

NCR EMPLOYEES' INDEPENDENT UNION, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF OF THE INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW) IN OPPOSITION

QUESTIONS PRESENTED

1. When a union reasonably believes that a particular dispute arising under a strike settlement agreement is not subject to the arbitration procedure of the basic collective bargaining agreement, and, acting upon that belief, files suit for breach of the separate contract, may a federal court, upon finding that the dispute is arbitrable, order the parties to arbitration?

2. May the court, in the exercise of its equitable powers and for reasons relating to national labor policy and the functioning of courts, decide for itself that the case should be arbitrated on the merits, without regard to the con-

tractual time limits for requesting arbitration, where the bringing of the lawsuit was the reason for the alleged failure to comply with the time limits?

3. When both of the above mentioned issues are determined in the affirmative with the case remanded by the court of appeals and no attempt at rehearing or appeal is made, is it within the appellate court's discretion to refuse to overrule its prior decision when the case is again before its attention on a second appeal?

STATEMENT OF THE CASE

The petition adequately summarizes most of the essential facts. However some clarification is necessary.[1] The "work schedule" agreement upon which this suit was based, was dated December 14, 1968 – approximately one and one-half months before the basic labor agreement was signed January 30, 1969. The work schedule was not listed as a "supplement" to the contract, and it was physically and timewise separate from the basic labor agreement. Under the labor agreement an arbitrable grievance is defined as "a dispute between the parties as to the interpretation, application or alleged violation of *this agreement* including any supplements thereto". (Emphasis ours.) The work schedule had been performed long before the signing of the basic labor agreement, and was neither part of or a supplement to the agreement. The union as an organization had every reason to believe they could pursue their remedy in court without prior resort to arbitration.

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[1] In 1971 the United Automobile, Aerospace & Agricultural Implement Workers of America (UAW) became the bargaining representative for NCR's employees in Dayton and successor to the rights of the Independent Union with respect to this lawsuit.

Further, as a practical matter, the company received adequate and timely notice of the existence and nature of the grievance. The subject matter of the dispute had already been raised by eight individual grievances filed in 1968. The company rejected the claims. Thus the union gave the company every opportunity to settle the dispute in the course of the grievance procedure. The record does not recite the date of the union's receipt of the company's Step 5 reply to the grievance. However, part of the union's claim was for overtime pay on Saturday, January 4, 1969, and it is reasonable to assume that some of the grievances were still pending when the contract was executed on January 30, 1969. The union had 30 days to demand arbitration. In the meantime, the class action lawsuit covering 12,000 employees was filed in mid February, 1969. The lawsuit was intended as substitute for arbitration. Because of the pendency of the lawsuit, the union did not process the eight individual grievances to arbitration, and the time limits for demanding arbitration expired, during the course of this litigation.

The union pressed its argument that a court trial was the preferred remedy until it received the unfavorable decision from the district court in 1971. That point was the first occasion when the union learned that its choice of remedy was in error. The union in its brief then advised the company and the circuit court that it would accept arbitration as an alternative remedy.

ARGUMENT

1. Under the doctrine of "the law of the case", the court properly decided not to reverse its prior determination.

In its first decision, the Sixth Circuit on April 10, 1972 remanded the case to the District Court, with instructions that the court order arbitration in the event the dispute was found to be arbitrable.[2]

NCR did not move for a re-hearing or attempt to appeal from the first decision. Thus the first decision became the "law of the case". Subsequently the District Court held that arbitration, rather than court, was the proper forum for resolution of the dispute, and following the "law of the case" ordered arbitration. The Sixth Circuit, in its December 1973 decision, merely reaffirmed its earlier decision, in conformity with the "Law of the Case", which is to be followed unless the prior decision is "clearly erroneous and would work a manifest injustice". *White* v. *Murtha*, 377 F2 428 at 432 (CA5 1967); *Vol. 1B Moore's Fed.*

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[2] The full text of that portion of the Court's opinion dealing with the issue reads as follows:

> "In the event the court proceeds in this manner and again concludes that arbitration is the exclusive remedy on the merits of plaintiffs' claim of violation of the "Work Schedule," we think that in the interest of justice and equity the court should direct the parties to proceed to arbitration on the violation issue rather than dismiss the action outright.[1] It follows that if the court should conclude that the plaintiffs' claim is not governed by any arbitration clause, it would then proceed to determine the plaintiffs' claim on the merits.

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[1] The Court in this event should specify the applicable arbitration provision and its order should direct arbitration of the substantive issue without regard to any possible contractual time or other procedural limitations. To enforce its order the Court will retain jurisdiction pending arbitration."

Practice, pp. 401-409, 431-455. This court has acknowledged the salutory purpose of the doctrine of the "law of the case" in *Stewart* v. *Stewart*, 97 US 361 (1878), and for this reason should be particularly reluctant to review the merits of this petition.

2. The decision of the court ordering arbitration was correct and was not an abuse of discretion.

This was an action for breach of contract under Section 301 (a) of the Act (29 USC Section 185 (a)). The court's power to order arbitration, springs from its inherent equitable power, and also from the specific mandate of the *Lincoln Mills* case which empowers the federal courts to "fashion remedies" pursuant to national labor policy.[3] Federal courts have frequently ordered arbitration as a remedy in suits originally brought as damage actions under Section 301 (a). *Boone* v. *Armstrong Cork Co.*, 384 F2 285 (CA4 1967); *Asbestos Workers Local 66* v. *Leona Corp.*, 434 F2 192 (CA5 1970); *Mason-Dixon Lines, Inv.* v. *Local 66*, 443 F2 807 (CA3 1971).[4]

The "equities" in favor of arbitration were particularly powerful in the case at bar. The union never slept on its rights. Individual grievances were filed promptly, soon after the breach of contract arose. The union then filed its lawsuit on February 13, 1969, only two weeks after the new contract was signed on January 30, 1969.

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[3] In *Textile Workers Union* v. *Lincoln Mills*, 353 US 448 (1957), the court held that in suits for violation of a labor agreement the courts must fashion the law "from the policy of our national labor laws. . . . The range of judicial inventiveness will be determined by the nature of the problem".

[4] The *Boone* case cited by the court below, involved a "misunderstanding by all parties concerned as to the availablity of the procedure" and the court remanded the damage suit, for exhaustion of contract remedies.

For a variety of reasons, the union believed that a court was the proper forum to resolve the dispute involving a separate strike settlement agreement and the claims of several hundred thousand dollars in damages.[5] The company disagreed, arguing that arbitration was the exclusive remedy. Consistent with its position, during the early stages of litigation the company "submitted a written agreement to the union to voluntarily arbitrate the merits involved in this case.[6] The company subsequently changed its position.

The court noted that "the union did not act unreasonably when it concluded that the schedule was not incorporated into the agreement and that its remedy was with the courts, not the grievance procedure". However, the lower court agreed with the company and held that arbitration was the proper remedy. The union did not cross-appeal from the District Court's ruling of January 1973 because by then — four years after the dispute arose — the union most of all desired a speedy expeditious ruling on the merits, without regard to which forum was to govern.

The company's argument, that the plaintiffs should now be forever barred from any hearing of their claim, is not only inconsistent with its earlier position but also would cause a monstrous result, at odds with national labor policy as reflected in the *Steelworkers* trilogy.[7]

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[5] In a similar case involving a claim of breach of a strike settlement agreement, NCR refused to arbitrate, arguing that the grievance was not covered by the basic labor agreement. *NCR* v. *Wilson*, 35 LA 647 (NY Court of Appeals 1960).

[6] Quoted from the Company's memorandum contra plaintiff's additional evidence filed in the District Court, September 11, 1972.

[7] *United Steelworkers of America* v. *American Mfg. Co.*, 363 US 564 (1960), et seq.

Nothing in the *Republic Steel Corporation* v. *Maddox*, 379 US 650 (1965), is inconsistent with the decision herein. First of all in *Maddox* the plaintiff made no effort to utilize the grievance procedure. He waited three years before bringing his claim to the company's attention by his suit. Further, there was no question of substantive arbitrability or doubt that his claim was covered by the agreement. In addition, the court in *Maddox* was concerned with the problem of an individual who attempted to bypass the union and ruled accordingly. No such problem exists in the present case.

In addition Maddox never requested arbitration and the union as an organization was not even a party to the suit. The court never addressed itself to the issue of whether arbitration was a proper alternative remedy, but held only that the plaintiff could not maintain his suit for damages without prior attempted exhaustion of grievance remedies. Thus the *Maddox* case does not even touch the issue raised by the instant case.

There was nothing novel or extraordinary about the court's order of arbitration.[8] It was consistent with the equities, with national labor policy, with the position of the company, and within the range of remedial options available to the courts. (See cases cited p. 5, *supra*.)

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[8] Other examples of national policy, encouraging arbitration on the merits as an alternative remedy where different forums are initially chosen are *Boys Markets* v. *Retail Clerks Union*, 398 US 235 (1970), where an order of arbitration accompanies an injunction against a strike, if the substantive issue is arbitrable and *Collyer Insulated Wire*, 192 NLRB No. 150 (1971), where the National Labor Relations Board defers unfair labor practice charges to arbitration.

3. The court's order, requiring arbitration on the merits, was correct and not an abuse of discretion.

The courts have an important interest in protecting and preserving access to courts for all those who reasonably and in good faith believe they have a claim within the court's jurisdiction. Requiring the parties to a labor agreement to make a final "election" of remedies, at the onset, can only result in the choking off of access to the courts. This court has dealt with a similar problem in *Burnett* v. *New York Central Railroad Co.*, 380 US 424 (1965), where a plaintiff's FELA suit was dismissed in state court because of improper venue. A subsequent filing in federal court, after the statute of limitations had run, was held not to bar suit. The court held that the basic inquiry was whether congressional purpose was effectuated by a rigid application of an election of remedies doctrine.

A similar result was reached in the famous case of *Culpepper* v. *Reynolds Metals Co.*, 421 F2 888 (CA5 1970), where the court held that a plaintiff who presses a claim in one forum, is not foreclosed from subsequent pursuit of a different remedy in another forum after the latter's time limits have expired and ruled "the statute of limitations which has been held to be a jurisdictional requirement (under Title VII of the Civil Rights Act) is tolled once an employee invokes his contractural grievance remedies."[9]

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[9] For a recent example of the court's reluctance to rigidly apply the doctrine of election of remedies see *Alexander* v. *Gardner-Denver Co.*, 42 LW 4214 (Feb. 19, 1974). For other cases where the plaintiff mistakenly chose the wrong forum but was subsequently allowed to pursue the action in the correct forum see *Roth* v. *Northern Assurance Co., Ltd.*, 32 Ill. 2d 40, 203 NE2 415, 16 ALR3 442 (1965); *Water Light & Gas Co.* v. *City of Hutchison*, 160 F 41 (CA 8 1908); *Norwood* v. *MacDonald*, 142 OS 299 (1943). *See also* Vol. 5A *Corbin Contracts*, Section 1225 (1971 ed.). "It ought to be obvious that when a plaintiff erroneously thinks that a certain remedy is available to him,

The Sixth Circuit, in the instant case, in effect followed similar reasoning, holding that, the plaintiff by its unsuccessful efforts to exhaust grievance remedies, and by its timely lawsuit was, as a matter of equity, entitled to a decision on the merits in arbitration.

Defendant argues that the cases of *John Wiley & Sons* v. *Livingston*, 376 US 543 (1964), and its progeny, including *Operating Engineers* v. *Flair Builders*, 406 US 487 (1972), forbid the result herein.

The typical *Wiley-Operating Engineers* case involves a situation where a union originally demands arbitration, and is resisted by a company that claims the case is not arbitrable for procedural reasons, such as lack of timeliness or laches. The reverse position was taken in the case at bar. Here the union, from the onset, sought a determination of the merits in court and the company claimed the matter was exclusively reserved for arbitration.

Wiley and like cases involved unions that allegedly failed to act promptly in every respect and not out of mistake as to the proper remedy. Here the union acted promptly and the company was not prejudiced by failure to be notified of the union's claim. The reasoning of the *Wiley* doctrine is totally inapplicable. A primary purpose of *Wiley* was to prevent the long delay that would follow if companies could resist and delay arbitration on procedural grounds relying upon the court to decide these issues. No such incentive could operate in situations such as the present case.

The other rationale of *Wiley* was that matters of procedural arbitrability involving intrinsic questions of con-

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his futile attempt to procure it by legal proceedings ought not to be described as an election between an alternative remedy".

For a recent Ohio case critical of the harsh election of remedies doctrine see *Singer* v. *Scholz Homes*, 36 OApp2d 125 (1973).

tract interpretation are more within the expertise of the arbitrator than the courts. In *Operator Engineers* the court similarly held that the defense of laches was a dispute specifically covered by the contract and should be decided by an arbitrator not a court.

Neither of these cases dealt with matters concerning the functioning of and access to the courts. Neither dealt with the question of whether a lawsuit is a fatal election of remedies, barring subsequent arbitration. *These questions could not be answered by an arbitrator but only by a court.* The arbitrator is bound by the four corners of the contract. He has neither the expertise nor authority to decide on issues relating to the operation of the courts.

There is nothing unusual about the court requiring arbitration on the merits as an alternative remedy in special situations, after contractural time limits have passed. One example was recognized in *Vaca* v. *Sipes*, 301 US 171 (1967), where in the event of an individual's suit for breach of contract and unfair representation, the court held "an order compelling arbitration should be viewed as one of the available remedies".

Another example is *Drake Bakeries* v. *Bakery & Confectionery Workers Local 50*, 370 US 254 (1962). There the company sued the union for breach of contract because of an illegal strike. The union never filed a grievance or demand for arbitration of the damage claim. Yet the court granted the union's motion for stay pending arbitration of the damage claim. This court rejected the company's argument that the union "had not proceeded with dispatch in seeking arbitration", holding similar to the sixth circuit in the instant case, that its action in *court*, in moving for a stay, was sufficent to invoke arbitration.

In the *Wiley*, *Operating Engineers* line of cases this court

has ruled that disputes concerning procedural arbitrability covered by the contract are generally for the arbitrator and not a court. The court below did not seek to change these well settled principles. The court merely decided that fundamental questions of interplay between the two forums – court and arbitration – and the bearing of national labor policy upon the election of remedies doctrine was a matter the court had the power and duty to resolve.

4. This case is inappropriate for Certiorari.

The peculiar and very special facts of the case at bar make it an inappropriate vehicle for expounding general principles of law.

First of all this suit did not involve the normal grievance, such as a discharge or seniority dispute. Furthermore, most unions seek arbitration in the first instance, and do not go directly to court. Generally it is the company, and not the union that initially claims the dispute is for the court and the arbitrator. Because the fact pattern is so unusual, any effort to formulate general rules applicable to other cases would be difficult.

There are other reasons for denying certiorari. Neither the plaintiff nor the court below expressly or by implication seek to change or modify the rules set forth in *Wiley*, *Operating Engineers*, or *Maddox*. Defendant's misguided attempt to build a "straw man" argument in order to create a conflict among the circuits should be transparent. *Furthermore, the result of the case conforms with traditional notions of fairness.* Defendants cite no substantive policy reasons why plaintiff should be denied the opportunity of a hearing on the merits. Their sole arguments are that the

union did not file a "timely" demand for arbitration, and that questions of contract interpretation involving procedural arbitrability are for the arbitrator. Yet the union's lawsuit (filed only two weeks after the contract was executed) was filed within time limits for demanding arbitration, and the company can claim no lack of notice of the union's desire to pursue its claim or resulting prejudice. Further, the matter before the court was not a routine question of procedural arbitrability involving interpretation of the contract (generally for the arbitrator) but, rather basic issues concerning the doctrine of election of remedies, national labor policy, and protection of those who reasonably seek court relief — all traditionally issues for a court.

CONCLUSION

There was no "manifest injustice" or "clear error" requiring the Sixth Circuit in 1973 to deviate from the "law of the case" established in its 1972 decision. The order furthers national labor policy in favor of arbitration and also furthers the policy of protecting the right of unhindered access to the courts.

Its ruling, allowing plaintiffs their full access to court and lifting any Draconian punishment for having mistakenly, but reasonably and in good faith, chosen the wrong forum avoided rather than constituted an injustice. After having extolled the virtues of arbitration in order to secure a dismissal of the suit, petitioners can hardly claim injustice in obtaining in effect what they asked for all along.

For all these reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1973

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THE NATIONAL CASH REGISTER COMPANY,
Petitioner,

vs.

NCR EMPLOYEES' INDEPENDENT UNION, ET AL.,
Respondents.

REPLY BRIEF OF PETITIONER, THE NATIONAL CASH REGISTER COMPANY

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In the Supreme Court of the United States

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REPLY BRIEF OF PETITIONER, THE NATIONAL CASH REGISTER COMPANY

1. "The Law of the Case" Doctrine Is Inapplicable.

In Section 1 of their brief, the Respondents contend that this Court cannot review the judgment entered by the Court of Appeals for the Sixth Circuit on December 18, 1973, because the earlier decision of the Sixth Circuit entered on April 10, 1972, was not the subject of a motion for rehearing or an attempted appeal at that time by the Petitioner. (Resp. Brief, pp. 4-5) There is no validity to this contention.

In its decision of April 10, 1972, the Court of Appeals did not order arbitration. (Sup. App. SA-1) The Court held that the court below should not have decided the issue

under Rule 12(b) without a hearing, and without prior notice that the motion to dismiss would be treated as a motion for summary judgment and the case disposed of in that manner. The Court of Appeals said:

> "We conclude that in the state of the present record the only equitable and reasonable alternative open to us is to vacate the judgment of the district court and remand the action for further proceedings. On remand, if the court intends to treat the motion to dismiss as a motion for summary judgment, notice should be given to this effect and a reasonable opportunity afforded to present any additional evidence bearing upon the issue of arbitration.
>
> "In the event the court proceeds in this manner and again concludes that arbitration is the exclusive remedy on the merits of plaintiffs' claim of violation of the 'Work Schedule,' we think that in the interest of justice and equity the court should direct the parties to proceed to arbitration on the violation issue rather than dismiss the action outright.[1] It follows that if the court should conclude that the plaintiffs' claim is not governed by any arbitration clause, it would then proceed to determine the plaintiffs' claim on the merits."

Footnote 1 stated that:

> "The Court in this event should specify the applicable arbitration provision and its order should direct arbitration of the substantive issue without regard to any possible contractual time or other procedural limitations. To enforce its order the Court will retain jurisdiction pending arbitration."

It is obvious that the above ruling was not an order to arbitrate, because the Court of Appeals specifically

instructed the District Court that if, after it received evidence, it concluded that the claim was not governed by any arbitration clause "it would then proceed to determine the plaintiffs' claim on the merits."

The order to arbitrate did not come until January 16, 1973, when the District Court concluded that arbitration was respondents' "exclusive remedy" and directed the parties to proceed to arbitration. (App. C) The respondents made a timely appeal of that decision to the Court of Appeals. That Court considered the appeal on its merits, giving consideration to evidence adduced at the hearing below by the respondents that:

> "This lawsuit was brought in an atmosphere of confusion as to whether the temporary work schedule was a part of the collective bargaining agreement."

It affirmed the order to arbitrate issued by the court below on January 16, 1973.

The Petitioner has made a timely application for certiorari subsequent to the entry of that judgment of the Court of Appeals. *28 U.S.C. §1254(1)* authorizes this Court to review *all* "cases in the Courts of Appeals" by "writ of certiorari granted upon the petition of any party * * * before or after rendition of judgment or decree." This is such a case and judgment and the doctrine of "law of the case" cannot bar review by this Court.

In *Mason-Dixon Lines, Inc.* v. *Local 560* (CA 3; 1971) 443 F. 2d 807, the District Court, as in the instant case, ordered arbitration and retained jurisdiction pending arbitration. It was contended that because of such retention of jurisdiction, the order was not a final order and was not appealable. The court rejected the contention and reviewed the case on its merits affirming the judgment of the District Court.

Stewart v. *Salamon* (1878) 97 U.S. 361, relied on by the Respondents (Brief, p. 5) was a case in which the Supreme Court had decided the issue on the first appeal and was then presented with a second appeal covering the same ground previously decided by the Court. In the instant case, this Court has never decided the issue presented by the instant petition for certiorari.

The Court of Appeals in its second decision of December 18, 1973 (App. A) did not regard its initial decision of April 10, 1972 (Sup. App. SA-1) as the law of the case binding on it in the second appeal because, as pointed out above, there had been no proper evidence before the trial court prior to the first appeal and the order given by the Court of Appeals in the first appeal was not a final order to arbitrate.

In *White* v. *Murtha* (CA 5; 1967) 377 F. 2d 428, relied on by the Respondents in their brief (Brief, p. 4), the case was in the posture it was in when before the same court on a previous occasion. Accordingly, the court properly regarded its previous decision as the "law of the case." In so doing, however, the court pointed out that "the 'law of the case' doctrine is not an inexorable command" and would not be applicable if "the evidence on a subsequent trial was substantially different" or "the decision was clearly erroneous and would work a manifest injustice." (At 431-32) Those also are factors which distinguish the present case.

2. The Court Below Erred in Ordering Arbitration.

The Respondents are in error when they state that the court below had "inherent equitable power" to order arbitration in the instant case "pursuant to national labor policy." (Brief, p. 5) Congress has stated:

> "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method

> for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement." (29 U.S.C. §203(d))

The District Court, in its order of January 16, 1973 (App. C), specifically found that:

> "* * * the 'Work Schedule' is an integral part of the Collective Bargaining Agreement and that the plaintiffs' exclusive remedy lies under the grievance arbitration procedures of the Bargaining Agreement executed January 30, 1969."

The Respondents acknowledge that they did not appeal that ruling or that finding. (Brief, p. 6) The collective bargaining agreement, which the court below has found to provide the "exclusive remedy" herein requires the Union to request arbitration "within thirty (30) calendar days after the Union's receipt of the Company's Step 5 reply to the grievance" and then specifically provides that:

> "Any grievance not so appealed shall be considered settled on the basis of the reply given in Step 5." (Petitioner's Brief, p. 10)

Within thirty days after the Company denied the grievances in the fifth step, the Respondents advised the Petitioner that they had decided *not* to arbitrate the grievances, and subsequently, filed their class action in the Court of Common Pleas.[1] Thereupon, under the method of adjustment agreed upon by the parties, the grievances were

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1. The Respondents' statement on page 9 of their brief that they had made "unsuccessful efforts to exhaust grievance remedies" and that this "as a matter of equity" entitled them "to a decision on the merits in arbitration" is wholly untrue. Elsewhere in the brief they have admitted that they did *not* "exhaust grievance remedies". They acknowledge that "the union did not process the eight individual grievances to arbitration, and the time limits for demanding arbitration expired, during the course of this litigation." (Brief, p. 3)

"considered settled on the basis of the reply given in Step 5."

When the court ordered arbitration under such circumstances it violated the agreement of the parties. It also violated the agreement when it ordered the parties to proceed to arbitration "without regard to any contractual time or procedural limitation contained in" the agreement. The parties had agreed that:

> "Where arbitrability such as timeliness is at issue, the Arbitrator will hear the evidence and argument on that issue, and decide that issue first." (Agreement, Section 7.08.04; Pet. brief, p. 4)

We have found no other decision in which a federal court has ordered parties to arbitrate in violation of specific terms of the parties' own agreement specifying a method of "final adjustment" of grievances under the contract. The cases cited by the Respondents are easily distinguished. In *Boone* v. *Armstrong Cork Co.* (CA 5; 1967) 387 F. 2d 285 (Brief, p. 5), the plaintiff sued without filing a grievance under the contract. Unlike the instant case, the contract contained no time limit within which grievances had to be filed and there was no provision that the grievance would be considered settled if not filed within the time limit. The court directed the District Court to suspend further proceedings "until the parties have had reasonable opportunity to exhaust the contractual grievance procedure." (At 290)

Likewise, in *International Association of Heat and Frost Insulators and Asbestos Workers, Local 66* v. *Leona Lee Corp.* (CA 5; 1970) 434 F. 2d 192 (Brief, p. 5), the collective bargaining agreement provided that all disputes would be settled through reference to a trade board and ultimately by arbitration. There were no time limits for the presentation of disputes to the trade board. The grievance pro-

cedure had not been initiated because the dispute arose under a separate "settlement agreement" which had been executed during the term of the collective bargaining agreement. The court found that the "settlement agreement" was intended to be a part of the collective bargaining agreement and directed the parties to submit the dispute to the trade board under the provisions of that agreement. Unlike the instant case, this order of the court did not in any way violate or disregard provisions of the applicable collective agreement. Also, in the instant case, unlike *Leona Lee*, a grievance had been filed and had been processed through five steps of the grievance procedure before the suit was filed.

In *Mason-Dixon Lines, Inc.* v. *Local 560, supra* (Brief, p. 5), the parties had agreed that all disputes would be resolved "pursuant to the grievance procedure." The agreement contained no time limits for the initiation of grievances. As the employer sued without first resorting to the grievance procedure, the court directed that it do so, and stayed the proceeding pending exhaustion of the grievance procedure. The court did not direct the arbitrator to ignore "contractual time or procedural limitation" as in the instant case. (App. A.3, 10)

The Respondents assert that permitting the Petitioner to advance "contractual time or procedural limitation" issues would produce "a monstrous result." (Brief, p. 6) Actually, it is the decision of the court below that produces "a monstrous result." The Petitioner bargained and paid for certain protections in its collective bargaining agreement with the Respondents. One of these was that any grievance, if it is to be arbitrated, requires "written notification to that effect to the Company given within thirty (30) calendar days after the Union's receipt of the Company's Step 5 reply to the grievance." (Agreement, Sec-

tion 7.08; Pet. brief, p. 10) A second protection was that, "Any grievance not so appealed shall be considered settled on the basis of the reply given in Step 5." (Agreement, Section 7.08; Pet. brief, p. 10) The decision of the court below strips the Petitioner of these protections in consideration of which it gave wage increases and many other benefits. Before the expiration of the thirty days, the Union notified the Petitioner that it had decided not to take the case to arbitration. Petitioner has now been required to litigate a grievance which the parties had agreed was to "be considered settled on the basis of the reply given in Step 5." Collective bargaining is not a one-way street. Employers, as well as employees, acquire rights from collective bargaining agreements. *Haynes* v. *U. S. Pipe & Foundry Co.* (CA 5; 1966) 362 F. 2d 414.

3. The Doctrine of Election of Remedies Is Inapplicable.

The doctrine of election of remedies "refers to situations where an individual pursues remedies that are legally or factually inconsistent." *Harold Alexander* v. *Gardner-Denver Co.* (1974) ..... U.S. .....; 42 L.W. 4214, at 4218. The litigant has two remedies available and is bound to pursue one or the other, but not both. *In the instant case, the Petitioner never had a choice of remedies.* Under the Trilogy decisions of this Court, the grievance procedure, terminating in arbitration, by agreement of the parties was the *sole* remedy. The Respondents recognized this by filing their grievances promptly under the contract grievance procedure and carrying them through the first five steps of the procedure. Although arbitration was permitted, the Union notified the Petitioner that it had decided not to arbitrate. Subsequently, it sued. The Respondents have now admitted to this Court that the Union's "choice of remedy was in error." (Brief, p. 3)

Obviously, the filing of the suit could not excuse the Respondents' failure to make a timely request for arbitration. If there was "an atmosphere of confusion as to whether the temporary work schedule was a part of the collective bargaining agreement," as suggested by the Court of Appeals (App. A.3), the Respondents could easily have protected themselves by noticing the grievances for arbitration and concurrently filing the lawsuit. Filing the lawsuit did not prevent them from requesting arbitration.

In *Burnett* v. *New York Central R.R. Co.* (1965) 380 U.S. 424 (Brief, p. 8), it was held that timely commencement of a Federal Employer's Liability Act action in a state court tolled the statute of limitations on the filing of such a proceeding in federal court. The decision was based on "*legislative* intent." The instant case is not based on statute but on contract. The intention of the parties is crystal clear. They specifically agreed that a grievance not appealed to arbitration within thirty days "shall be considered settled on the basis of the reply given in Step 5." The decision of the court below, therefore, does not implement "intent"—it violates intent.

Culpepper v. *Reynolds Metals Co.* (CA 5; 1970) 421 F. 2d 888 (Brief, p. 8) is another case in which the court construed *legislative* intent and concluded that the legislature would have intended that the timely filing of an arbitration proceeding would toll the limitation period of a remedial civil rights statute.

4. This Case Is Appropriate for Certiorari.

Certiorari is clearly appropriate because the court below has violated decisions of this Court. The Petitioner is not asking the Court to expound "general principles of law." (Brief, p. 11) It is asking this Court to correct the decision of the Court of Appeals which is clearly erroneous and in flagrant violation of landmark decisions of this Court. In such situations, it is entirely appropriate, as in *Oscar R. Ewing* v. *Theodore F. Gardner* (1951) 341 U.S. 321, for the Court to grant certiorari and issue a per curiam opinion reversing the decision below.

Respectfully submitted,

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SUPPLEMENTARY APPENDIX

No. 71-1526

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NCR EMPLOYEES' INDEPENDENT UNION, et al.,
Plaintiffs-Appellants,

v.

NATIONAL CASH REGISTER COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Ohio, Western Division.

Decided and Filed April 10, 1972

BEFORE: PHILLIPS, Chief Judge, and CELEBREZZE and MILLER, Circuit Judges.

Per Curiam. This action was originally instituted in the Common Pleas Court of Montgomery County, Ohio, by the NCR Employees' Independent Union and three individual employees against the National Cash Register Company, seeking a declaration of the rights of production and maintenance employees to be recalled for overtime work on Saturday, December 28, 1968, and Saturday, January 4, 1969, under the terms of a "Work Schedule" agreed upon by the union and the company as part of a strike settlement. The plaintiffs also sought an award for compensation for employees who were not recalled for work on those days. Upon petition of the defendant the action was removed on federal question grounds to the United States District Court for the Southern District of Ohio. After removal, the defendant filed a motion for summary judgment, pursuant to Rule 56 of the Federal Rules of

Civil Procedure, upon the ground that "plaintiffs are attempting to enforce its Union Agreement by judicial procedure rather than utilizing its exclusive remedy by grievance and arbitration procedure under said Agreement as applied by law."

In its memorandum filed in support of the motion for summary judgment the defendant conceded that "the court has jurisdiction by virtue of Sec. 301(a) of the National Labor Relations Act, 29 U.S.C. Sec. 185(a)." The issue raised by the motion for summary judgment was whether the "Work Schedule" upon which the plaintiffs based their claim was a part of the overall collective bargaining agreement to settle a strike of the employees or whether the "Work Schedule" was a separate and distinct agreement not subject to the grievance and arbitration procedure. Following the filing of the motion for summary judgment by the defendant on March 13, 1969, an extensive record was developed in the form of affidavits, answers to interrogatories and various exhibits, regarding the dealings and negotiations between the parties leading to the strike settlement and the eventual formalizing of a collective bargaining agreement on January 30, 1969, which was made retroactive to December 17, 1968.

By an order entered on July 28, 1969, the court overruled the motion for summary judgment without stating any reasons therefor. On August 28, 1969, the defendant filed its answer. Thereafter, further evidence was developed by the parties on factual issues pertaining both to the alleged violation of the "Work Schedule" agreement and to the question of arbitrability of the issues involved. On September 14, 1970, the defendant filed its motion to dismiss the action "on the ground that this court is without jurisdiction to hear and determine the same." In its memorandum in support of its motion to dismiss the

defendant made repeated references to the evidence which had been developed and argued essentially that the basis for the motion to dismiss for lack of jurisdiction was the theory that the exclusive remedy of the plaintiffs was arbitration as allegedly provided for by the strike settlement agreement. It was argued that this conclusion followed from the "testimony" which had been introduced. Still further evidence was introduced in the form of depositions after the filing of the motion to dismiss.

The district court on January 11, 1971 entered its memorandum opinion and order finding and holding that the court was without jurisdiction to redress the alleged violation of the "Work Schedule" agreement for the reason that the exclusive remedy of the plaintiffs "lies under the grievance arbitration procedures of the applicable bargaining agreement." The court pointed out in its memorandum that the action was before it upon the defendant's motion to dismiss for lack of jurisdiction, but in making disposition of the action the court treated the motion to dismiss "as a motion for summary judgment on the question of jurisdiction." So treating the motion the court examined the evidentiary record which had been developed and concluded (a) that there are no genuine issues of material fact and (b) that as a matter of law the "Work Schedule" is part of the overall bargaining agreement so that plaintiffs' exclusive remedy lies under the arbitration procedure of the collective bargaining agreement and not by an action in federal court.

An examination of the record fails to disclose that any formal hearing was held by the court or that any notice was given to the parties that the court intended to treat the time for taking evidence as closed and to dispose of the motion to dismiss as in the nature of a motion for summary judgment.

While we are not prepared to say that the court was incorrect in concluding that there was no genuine issue of fact as to the arbitration issue on the basis of the evidence as it had been developed as of that time, we find no authorization in the Federal Rules for the court to treat a motion to dismiss as a motion for summary judgment without a hearing and without notice to the parties that the motion would be so treated and the case disposed of in that manner.

Rule 56 may be read to authorize the court to dispose of a motion for summary judgment forthwith if the "pleadings, depositions, answers to interrogatories, and admissions on file together with affidavits, if any, show that there is no genuine issue as to any material fact." However, as we read the rule, this may be done under Rule 56 only where a hearing date has been set for disposition of a motion for summary judgment filed as such. This would seem to follow from the provision that the motion shall be served at least ten days "before the time fixed for the hearing," and the further provision that the adverse party "prior to the day of hearing" may serve opposing affidavits.

Rule 12 (b) authorizes the court to treat a motion to dismiss as one for summary judgment and to dispose of the case in conformity with Rule 56, but this procedure appears to be confined to motions to dismiss "for failure of the pleadings to state a claim upon which relief can be granted." It is significant that the Rule further provides that in the event the motion to dismiss is so treated as one for summary judgment "all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Rule 12(c) also provides that the court may treat a motion to dismiss on the pleadings as a motion for summary judgment if matters

outside the pleadings are presented to and not excluded by the court. Yet in this instance also the Rule provides "that all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Although, as stated, we have not found any direct authorization for the court to treat a motion to dismiss for lack of jurisdiction as a motion for summary judgment where matters outside the record have been presented and not excluded by the court, as was done in this case, we are of the opinion by analogy to the procedure provided for by Rules 12(b) and (c), that such a motion could be treated by the court as a motion for summary judgment, but only after the court gives notice to the parties that it intends to treat the motion to dismiss in that manner and allows a reasonable time for the parties to present any further evidentiary matters which may be relevant and available to them.

In this case the district court, so far as we can determine after a review of the record, treated the motion to dismiss for lack of jurisdiction as a motion for summary judgment without notice to the parties and without affording them any further opportunity to develop the factual issues. It may be that all of the pertinent evidence had been placed on record as of the time the District Court entered its memorandum opinion, but there is no way in the record for us to determine this fact and there is no way for us to know that the District Judge was in position to conclude that there was no further evidence to be presented by either party. We conclude that in the state of the present record the only equitable and reasonable alternative open to us is to vacate the judgment of the district court and remand the action for further proceedings. On remand, if the court intends to treat the motion to dismiss as a motion for summary judgment, notice should be given to this effect and a reasonable

opportunity afforded to present any additional evidence bearing upon the issue of arbitration.

In the event the court proceeds in this manner and again concludes that arbitration is the exclusive remedy on the merits of plaintiffs' claim of violation of the "Work Schedule," we think that in the interest of justice and equity the court should direct the parties to proceed to arbitration on the violation issue rather than dismiss the action outright.[1] It follows that if the court should conclude that the plaintiffs' claim is not governed by any arbitration clause, it would then proceed to determine the plaintiffs' claim on the merits.

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1. The Court in this event should specify the applicable arbitration provision and its order should direct arbitration of the substantive issue without regard to any possible contractual time or other procedural limitations. To enforce its order the Court will retain jurisdiction pending arbitration.